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EDUCATION LAW AND POLICY ALERT

The U.S. Supreme Court Decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger* (Issued June 23, 2003)

Case Analysis and Lessons Learned Regarding the Use of Race by Colleges and Universities

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Introduction

In *Gratz v. Bollinger*[1] and *Grutter v. Bollinger,*[2] the U.S. Supreme Court affirmed the authority of colleges and universities to consider race or ethnicity[3] as one factor among many in admissions decisions where necessary to further their *compelling* interest in promoting the educational benefits of diversity. The Court also held that when colleges and universities pursue this interest, only program designs that ensure individualized consideration of applicants (and their diversity attributes) can be sufficiently *narrowly tailored* to meet federal legal requirements. Thus, the Court upheld the University of Michigan Law School's admissions policy (in *Grutter*), which includes an individualized, full-file review of all applications, while striking down the University of Michigan's undergraduate admissions policy (in *Gratz*), which assigns points to applicants based on certain admissions criteria, including race and ethnicity.

Taken together, these decisions affirm longstanding legal standards – emanating from Justice Powell's 1978 decision in *Regents of the University of California v. Bakke*[4] – and provide a framework that can help guide colleges and universities as they review and consider the use of race-conscious policies in admissions, financial aid, recruitment, and other arenas. This Education Law and Policy Alert from Nixon Peabody LLP provides an initial analysis of *Gratz* and *Grutter* and their implications for higher education, including:

Nixon Peabody's Education Team is a leader in preventive law services in education – helping education leaders achieve their educational goals – including their diversity goals – in a manner that meets federal legal requirements. For more information, contact Art Coleman or Scott Palmer at (202) 585-8000 or www.nixonpeabody.com.

Background

The Legal Landscape

Under the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, classifications based on race are inherently suspect, and race-conscious policies are, therefore, subject to "strict scrutiny."[5] Under this standard, the consideration of race in conferring benefits at both public universities and private universities that receive federal funds will be upheld only where the given program serves a "compelling state interest" and is "narrowly tailored" to achieve that interest. Strict scrutiny thus involves an examination of both the ends and the means of race-conscious decisions to ensure that the interests pursued are sufficiently compelling and that the means are narrowly tailored to those ends, so that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."

Prior to the University of Michigan decisions, the Supreme Court had previously held that an institution's *remedial* interest in overcoming the present effects of past discrimination (though not general "societal" discrimination) can be sufficiently compelling to justify the use of race. Furthermore, in his landmark decision in *Bakke*, Justice Powell held that a university's *non-remedial* interest in promoting the educational benefits of diversity could justify the use of race in admissions as one factor among many. However, his "diversity rationale" was rendered in a "compromise" opinion that did not expressly command a majority of the Court. As a consequence, although it became the basis for most higher education programs that consider race or ethnicity, the diversity rationale also became the focus of recent litigation. Most notably, the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*[6] concluded that Justice Powell's opinion did not constitute the holding of the Court, and that diversity was not a compelling interest under federal law. The *Gratz* and *Grutter* cases put the diversity rationale directly before the Supreme Court.

In short, the Court in *Gratz* and *Grutter* addressed two issues in deciding whether the University of Michigan's admissions programs were lawful under the 14th Amendment, Title VI, and 42 U.S.C. §1981:[7]

1. Whether the University's interest in promoting the educational benefits of diversity was sufficiently *compelling* to justify using race or ethnicity as a factor; and

2. Whether the specific programs were sufficiently *narrowly tailored* to meet that interest.

The Decisions

In *Gratz* and *Grutter*, the Supreme Court affirmed and expanded upon the principles laid out by Justice Powell in *Bakke*, holding that a university's interest in promoting the educational benefits of diversity are sufficiently compelling to justify the consideration of race and ethnicity in admissions decisions. The Court also described the characteristics of admissions programs that can be sufficiently narrowly tailored to serve that interest.

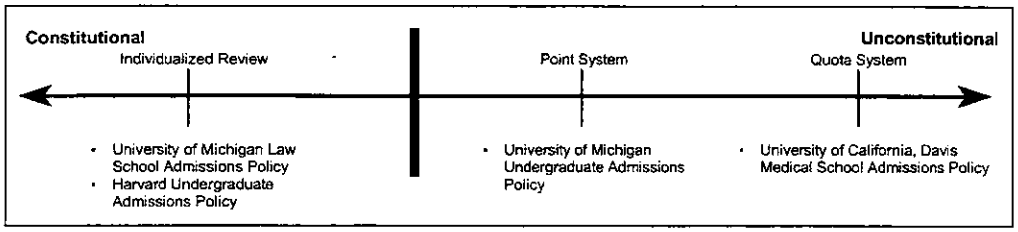
Although both of the University of Michigan's challenged admissions programs considered race or ethnicity as one factor among many with the goal of promoting the educational benefits of diversity, the policies differed in their design. The law school admissions process at issue in *Grutter* involved an individualized, holistic review of each applicant's file that considered both

academic criteria (grades, LSAT scores) and other criteria that were important to the law school's educational goals (such as work experience, leadership and service, letters of recommendation, and life experiences, including whether the applicant was an underrepresented minority). The undergraduate admissions process at issue in *Gratz* used a "Selection Index" where each applicant was awarded points toward admission based on preset criteria, with the maximum number of points awarded to any applicant totaling 150. Underrepresented minorities (as well as socio-economically disadvantaged students and students who attended a high school that served a predominately minority population) received 20 points under this program.

In *Grutter*, the Court (by a vote of 5-4) upheld the law school admissions program in its entirety. The Court recognized that the law school's interest in promoting the educational benefits of diversity is a sufficiently compelling interest to justify consideration of race or ethnicity as one of several factors in admissions decisions. The Court emphasized that it would show deference to the educational judgment of colleges and universities in valuing a diverse student body as part of their educational mission. The Court further found that the law school's individualized review was narrowly tailored – and consistent with the Harvard University admissions plan endorsed by Justice Powell in *Bakke* – in that the admissions program used an individualized review that was flexible, considered multiple factors, and was not unduly burdensome to non-minority applicants.

In *Gratz*, the Court (by a vote of 6-3) recognized (per the Court's decision in *Grutter*) that the undergraduate program served a compelling interest in diversity, but held that the University's admissions program was not sufficiently narrowly tailored because it used a point system that automatically awarded minority students 20 points regardless of other factors and did not allow for an individualized review and comparison of the full breadth or depth of diversity factors.

UNIVERSITY ADMISSIONS PLANS ANALYZED BY U.S. SUPREME COURT



The U.S. Supreme Court affirmed the lawfulness of The University of Michigan Law School admissions policy (in *Grutter*) based in part on its individualized review of all applicants (and their diversity attributes) – likening it to the Harvard University admissions policy (referenced with approval by Justice Powell in *Bakke*). The Court held unlawful the University of Michigan undergraduate admissions policy (in *Gratz*) based in part on its point system (which did not permit an individualized review), and had previously held unlawful the University of California, Davis Medical School admissions policy (in *Bakke*) based on its use of a rigid quota.

Key Decision Points and Lessons Learned[8]

The Court's decisions in *Gratz* and *Grutter* do not establish fundamentally new legal standards. Rather, the cases apply the "strict scrutiny" standard in a specific way to address head-on the question of whether and how universities may consider race or ethnicity as one factor among many to further their interest in promoting the educational benefits of diversity. The cases, therefore, provide an important framework and valuable insights for colleges and universities to use in reviewing their race-conscious, diversity-based programs. Key lessons from the Court's opinions include the following:

1. **The interest of colleges and universities in promoting the educational benefits of diversity, where applicable, is sufficiently compelling to justify the use of race or ethnicity in university admissions.** At the core of its decisions, the Court held that the interest of both the University of Michigan's Law School and its undergraduate program in promoting the educational benefits of diversity is sufficiently compelling to justify the limited use of race in student admissions (expressly rejecting the notion that only "remedial" interests can be "compelling").

   a. **Justice Powell's 1978 opinion in *Bakke* is a correct statement of the law.** The Court expressly "endorse[d]" Justice Powell's opinion and its "diversity rationale," which for 25 years has "served as the touchstone for constitutional analysis of race-conscious admissions policies." As a consequence, the Fifth Circuit's decision in *Hopwood v. Texas* is nullified in so far as it held that the diversity rationale could not be sufficiently compelling to justify race-based admissions programs. By contrast, legislative initiatives that prohibit the use of race as a matter of state policy, such as Proposition 209 in California, are not directly affected by the Court's decisions because the pursuit of diversity-related goals is a policy choice, not a federal legal requirement.

   b. **Colleges and universities are entitled to deference in their mission-driven educational judgments.** Recognizing that context matters when evaluating the legality of race-conscious programs under strict scrutiny, the Court held that the higher education context is unique. According to the Court, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Therefore, the Court deferred to the University of Michigan's educational judgment that diversity is essential to its educational mission, and held that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"

   c. **The educational benefits of diversity are "substantial" and "are not theoretical but real."** In finding this diversity interest to be compelling, the Court strongly endorsed the educational benefits of diversity. The Court recognized that "race unfortunately still matters" in our society and that racial diversity in colleges and universities can help enliven classroom discussions, break down racial stereotypes, and prepare students for success in our increasingly global marketplace. Notably (though its meaning in application requires further examination), the Court also stressed the importance of students from all racial and ethnic groups having access to public universities and law schools. According to the Court, "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.... In order to cultivate a set of leaders with legitimacy in the eyes of the

citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

The Court rendered its determination of the compelling nature of the diversity rationale based in part on substantial evidence regarding the educational benefits of diversity provided by the University and *amici*, including expert studies and reports and opinions from business and military leaders. Importantly, the Court's decision indicates that where a university's interest in promoting the educational benefits of diversity is central to its mission – a point on which the Court indicated that deference is required though evidence is relevant – then that interest is compelling as a matter of law.

d. **Colleges and universities may pursue a goal of admitting a "critical mass" of minority students as part of their effort to assemble a diverse student body.** The Court held that colleges and universities, in order to promote the educational benefits of diversity, can seek to enroll a "critical mass" of students from different racial and ethnic groups – so long as the critical mass is "defined by reference to the educational benefits that diversity is designed to produce," and the goal is not "some specified percentage of a particular group merely because of its race or ethnic origin."

In so holding, the Court distinguished between the establishment of permissible numerical goals and illegal quotas:

> Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal... require[s] only a good-faith effort... to come within a range demarcated by the goal itself, ... and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants.'" (Internal citations omitted.)

2. **Admissions programs that consider race or ethnicity to promote the educational benefits of diversity must ensure that those factors are considered only to the extent necessary and in a manner consistent with their mission-driven diversity goals.** The Court reaffirmed and expounded upon the basic "narrow tailoring" standards that have guided federal courts for decades, making important distinctions between the University of Michigan Law School's admissions program in *Grutter* and the University's undergraduate admissions program in *Gratz*.

   a. **Admissions programs that consider race or ethnicity under the diversity rationale must be designed to ensure individualized review of applicants and their diversity attributes.** The Court held that the importance of individualized consideration of applicants "in the context of a race-conscious admissions program is paramount." To satisfy this standard, universities seeking to justify the use of race or ethnicity in student admissions based on the diversity rationale must include an individualized, non-mechanical, full-file review of each applicant. "In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"

Thus, the Court in *Grutter* upheld the law school's admissions program, which consisted of a "highly individualized, holistic review" of each applicant's qualifications, including diversity factors beyond race. By contrast, the Court in *Gratz* struck down the undergraduate admission program, which consisted of a point system where 20 points were automatically awarded to each applicant who was an underrepresented minority. In the Court's eyes, the undergraduate admissions system did not guarantee a sufficiently individualized review by which the full breadth and depth of each applicant's diversity experiences could be evaluated and compared to other applicants. Moreover, the Court stated that the fact that the adoption of an individualized admissions programs might present administrative challenges or burdens based on the volume of applications some colleges and universities receive does not excuse them from the obligation of adopting admissions policies that meet federal constitutional and statutory mandates.

b. **Colleges and universities must consider race-neutral alternatives in good faith, but need not exhaust every option or sacrifice broader educational goals before using race-conscious programs.** According to the Court, the need to ensure the limited consideration of race "does not require exhaustion of every conceivable race-neutral alternative.... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Thus, the Court encouraged colleges and universities to examine and learn from others with regard to race-neutral alternatives as promising practices develop.

The Court stressed, however, that the consideration of race-neutral alternatives would be evaluated in the overall context of diversity and other mission-driven goals. The Court held that colleges and universities need not sacrifice their "academic quality" or broader educational goals in considering the efficacy of race-neutral alternatives. Thus, a college and university is not required to deemphasize such factors as grades or test scores to promote diversity before using race. In addition, the Court expressly questioned the propriety of "percentage plans" in the diversity context, stating, "[E]ven assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."

3. **Colleges and universities must perform periodic reviews of their race-based admissions programs, and such programs cannot be timeless.** The Court reaffirmed that a core purpose of the Fourteenth Amendment is to eliminate distinctions based on race, and, therefore, "race-conscious admissions policies must be limited in time." According to the Court, "[i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." This is consistent with longstanding narrow tailoring requirements, which require periodic review of race-conscious programs.

Finally, the Court ended its opinion in *Grutter* with a concrete prognostication (and notice) for the higher education community and the nation, saying, "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Action Steps for Colleges and Universities

The Court's decisions in *Gratz* and *Grutter* reaffirm the authority of colleges and universities to define and pursue their educational mission – including the educational benefits of diversity – within federal constitutional and statutory parameters. These parameters are made more clear by the Court's decisions, which build on existing legal standards and provide important information that can guide colleges and universities. As a matter of sound policy – and as required by constitutional law as part of narrow tailoring – it is incumbent on each college and university in light of the Court's decisions to review its race-based policies in admissions, financial aid, recruitment, and more.[9] The following are several recommended steps that colleges and universities should take in that regard:

- ❑ **Inventory all race- and ethnicity-based policies *and* all other diversity-related policies (even if facially race-neutral), including admissions, financial aid, outreach, recruitment, and employment policies.**

- ❑ **Establish an inter-disciplinary strategic planning team and a process to evaluate the relevant policies, now and over time.**

- ❑ **Identify the diversity-related educational goals and supporting evidence that justify each of the relevant policies.**

- ❑ **Rigorously consider race-neutral alternatives in light of institutional goals.**

- ❑ **Ensure that any consideration of race is as limited as possible consistent with institutional diversity goals, including that admissions processes are individualized, flexible, and holistic.**

ENDNOTES

[1] *Gratz et al. v. Bollinger et al.*, No. 02-516, 539 U.S. __ (June 23, 2003).
[2] *Grutter v. Bollinger et al.*, No. 02-241, 539 U.S. __ (June 23, 2003).
[3] In several places, this Alert uses the term "race" or "ethnicity" to stand for both race and ethnicity, such as with regard to "race-conscious" actions.
[4] *University of California v. Bakke*, 438 U.S. 265 (1978).
[5] The Fourteenth Amendment prohibits states from denying "any person within [their] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Title VI prohibits discrimination "under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.
[6] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).
[7] Section 1981 provides that all persons "shall have the same right ... to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. §1981. Applicable to private conduct, §1981 proscribes "purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment."
[8] This section of the Alert discusses the Supreme Court's decisions in *Gratz* and *Grutter* taken together. All quotations are from the Court's opinion in either *Gratz* or *Grutter*.
[9] See generally Arthur L. Coleman, *Diversity in Higher Education: A Strategic Planning and Policy Manual* (The College Board, 2001).